



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**  
**Criminal Case 7 of 2001**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**DANIEL KYALO MAUNDU ..... ACCUSED**

**SUMMING UP BY JUDGE**

The accused person, Daniel Kyalo Maundu is charged with the offence of Murder Contrary to Section 203 as read with Section 204 of the Penal Code.

The particulars of the offence are that on the night of 19/1/00 at around 2.00 a.m. at Kaluluini village in Mua Hills location in Machakos district accused murdered Moses Mweu Maundu. He denied the charge. The prosecution called a total of 4 witnesses in support of their case whereas the accused gave an unsworn statement in his defence.

Now gentlemen and lady assessors, having heard all the evidence before you by the prosecution witnesses in support of the above charge and that of the accused in his defence, I urge you to bear in mind the following salient issues of law and evidence before arriving at your verdict in this case. Do also bear in mind the submissions in this case by both counsel for the prosecution and the defence with particular regard to the following:

1. This being a criminal case, the burden of proof that the accused person committed the offence is entirely upon the prosecution and at no time does such burden shift to the defence or the accused person.

2. The prosecution case against the accused person must be proved beyond any reasonable doubt.

The existence of doubt leads to an acquittal, that is, if you entertain the slightest doubt that accused could not have committed the offence charged, that benefit of doubt goes to the accused person and you must return a verdict of not guilty.

3. You must consider the case for the defence, failure to consider the defence case will be fatal to any verdict that you may arrive at. Both the prosecution and defence cases must be considered in their totality.

4. Murder is defined in Section 203 of the Penal code. The elements of the offence which must exist and which must be proved before the accused person can be found guilty of the offence are as follows:

i. Malice aforethought

ii. Cause of death

iii. By an unlawful Act

Malice aforethought is defined in Section 206 of the Penal Code. The ingredients are:

- i. Intention to cause death or do harm
- ii. Knowledge that an act will cause death or grievous harm.

**Evidence:**

I will summarize the evidence that was adduced by both the prosecution and the defence which you should consider.

The accused is the elder brother of the deceased. According to the evidence of their father PW1 Pastor David Maundu, on 18/1/00, he was at his home in Mua Hills. He recalled that at about 9.30 p.m. The accused arrived home and went to the house where he slept with his brother, the deceased which was also used as a kitchen. Later, the deceased arrived and PW1 went to ask why he had arrived home so late and he claimed to have been playing football. PW1 retired to bed between 9.30 p.m and 10.00 p.m. The house where accused and deceased slept was about 10 metres from PW1's house. At about 2.00 p.m. PW1 heard noises outside. He thought there were thieves, he blew a whistle and called out his eldest son's name, Patrick Maundu (PW2) who lives in the same compound with his family. PW2 came to his aid and PW1 opened his door and went outside. Together with PW2 they found Moses and Daniel's house open. They had a hurricane lamp. They found Moses lying on the floor dead. The deceased was not in the house. A search for accused on that night was fruitless. Accused was brought home at 8.00 a.m on the next day under arrest. A stone which PW1 used to use for knowing was suspected to be the murder weapon because it was found to have been stained with blood and had some hair on it. PW1 observed that the deceased had sustained injuries on his head and was bleeding from the said injury. He denied that the door to that house was broken and the window was closed. He denied that there was any disagreements between his two sons that he knew of save for minor differences over food. He also denied that the accused suffered from any mental illness.

PW 2, Patrick Munyao Maundu, the eldest son of PW1 corroborated PW 1's evidence that he heard PW1 calling out for him on 19/1/00 about 2.00 a.m. He hit the lamp and went to PW1's house. PW1 then told him of the movements he heard outside. Both of them checked outside and found nobody. They noticed the door to the house where accused and deceased slept was open. On entering they found the deceased on the floor, dead with blood flowing from the head. The accused was nowhere. PW2 first informed the neighbours about the incident and later reported to police. PW1 identified the stone that had been in their compound since his childhood which was suspected to be murder weapon. He further stated that accused and deceased had lived in that house since they were born. He used to see as if accused was not of sound mind.

PW3, Thomas Kyalo, a neighbour of the deceased and accused learnt of the murder and when the accused went to his house at about 7,30 a.m. on 19/1/00 asking for tea, PW3 pretended to be getting sugar from the shop and got one Daniel Kioli to help arrest accused, tied him up and took him to his home. PW3 also saw the body of the deceased which lay near the door to the house. He said that people threatened accused with beating and he showed the stone which he allegedly used to murder his brother. He denied that accused was ever beaten.

Doctor Edmund Wazome (PW4) a psychiatrist based at Machakos General Hospital recalled that on 14/8/00 he was requested by Machakos Police Station to examine the accused Daniel Kyalo Maundu and he found him to be unfit to plead as he was suffering from Schizophrenia, that is, a metal illness that affects the thinking process; perception, one haluscinate and a lack of insight to know whether one is sick or not. Accused was treated for two months then and also six months in 2003 and was discharged. The doctor examined him again on 11/3/05 and found him to be of sound mind and capable of defending himself. The doctor produced his report as Ex. No.3. PW4 also produced the postmortem report in respect of the deceased on behalf of Doctor Kibore who is deceased and whom PW4 had worked with for 18

years. The postmortem was performed on 26/1/00 and the Doctor found that the deceased's skull was smashed and had multiple fractures and the Doctor opined that the cause of death was severe head injury arising from severe head trauma caused by a blow by a heavy object.

Accused in his unsworn defence raised an alibi. He denied murdering his brother and that on 18/1/00 he went to his place of work. He resided at his place of work. He slept there and next day which must be 19/1/00, his employer told him that there was no work and asked him to go to work the next day. He decided to go home and before he reached he went to his friend's home where he stayed for a while. The friend asked him to go and fetch water for him using a bicycle and said he was going to get an air pump. Instead his friend came back with somebody and another arrived and they asked him if he was aware of the death of his brother which he denied. He was tied up. He was later arrested by police from Machakos Police Station.

The evidence against the accused is circumstantial as nobody saw him murder his brother. For such evidence to find a conviction it must be cogently and firmly established; the circumstances should be definite and point at none else but the guilt of the accused and lastly the circumstances taken cumulatively should form such a chain that there is no escape from the conclusion that within all human probability the accused committed the offence and none else.

The accused gave an alibi in his defence. Consider whether it has displaced the evidence of PW1, 2, 3 and 4. Did he have an opportunity to murder the deceased?

It was the evidence of Doctor Wazome that the accused was of unsound mind at the time of commission of the offence. The offence was allegedly committed on the night of 18th and 19th January 2000. The doctor examined the accused on 14/8/00, about 7 months after the alleged murder. The accused's mental status soon after the commission of the offence was not ascertained. Consider whether there is a possibility that accused may have been of sound mind at the time of commission of the offence. If your verdict is that he committed the offence then you should go ahead and decide whether he was guilty but insane or he is guilty but was of sound mind at the time of commission of the offence.

Once again, I urge you to consider all the evidence of both the prosecution and defence exhaustively. Bear in mind the submissions by counsels also. I expect each of you to individually give your opinion or verdict. Take as long as you require to give your verdict and if you need any clarification, please notify the court clerk so that I can do so in open court. You may now retire.

**R.V. WENDOH**

**JUDGE**

**Dated at Machakos this 30th day of September 2005**

**Read and delivered in the presence of**

**R.V. WENDOH**

**JUDGE**